BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAMELA J. WALSTON Claimant VS. **McCORMICK-ARMSTRONG COMPANY, INC.** Respondent AND **THE KANSAS PIA WORKERS COMPENSATION INSURANCE TRUST** Insurance Carrier AND **WORKERS COMPENSATION FUND**	)	Docket No. 177,456

ORDER

The Workers Compensation Fund requests review of the Award of Administrative Law Judge Shannon S. Krysl entered in this proceeding on May 19, 1995. The Appeals Board heard oral argument on September 5, 1995.

APPEARANCES

The respondent and its insurance carrier appeared by their attorney, Natalie Haag of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, James R. Roth of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge found the Workers Compensation Fund was solely liable for the benefits payable in this proceeding. The Workers Compensation Fund requests review of that finding. The liability of the Workers Compensation Fund is the sole issue now before this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the finding of Fund liability made by the Administrative Law Judge should be reversed.

The sole issue in this proceeding is whether the Workers Compensation Fund should bear a portion or all of the liability for the benefits payable in this proceeding.

The purpose of the Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, totally or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A 44-566(b) provides:

> "'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:
> . . . .
>
> (15) Loss of or partial loss of the use of any member of the body;
>
> (16) Any physical deformity or abnormality;
>
> (17) Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

An employer is wholly relieved of liability when the handicapped employee is injured or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 1992 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisting impairment. See K.S.A. 1992 Supp. 44-567(a)(2).

In either situation, it is the respondent's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1992 Supp. 44-567(b) provides:

> "In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to his former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), aff'd 242 Kan. 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan v. Inter-Collegiate Press, *supra.*

Although provisions imposing liability upon the Workers Compensation Fund are to be liberally construed, the Workers Compensation Act should be interpreted in such a manner as to carry out its primary and basic purposes. As indicated above, the Legislature created the Workers Compensation Fund for the basic and primary purpose of encouraging the employment of impaired individuals. Assessing liability against the Fund in situations where that primary purpose is not furthered is improper.

The Appeals Board finds the respondent did not have knowledge that claimant had an impairment that would constitute a handicap in her obtaining or retaining employment before the date of her work-related accident on April 12, 1993. In the early 1970's claimant was in a car accident which caused neck complaints. Claimant believes she fully recovered from that incident within several months. When claimant began working for the respondent in 1989, claimant took and passed a company physical. The physicians neither told claimant she had any problem with her neck, nor did they restrict her in any manner.

In 1990, claimant went to a chiropractor approximately six to ten (6-10) times for treatment of headaches, stiff neck, and pain between her shoulders. After these treatments, claimant testified she was pain free and the chiropractor did not give her any restrictions. While she was seeing the chiropractor, the respondent temporarily changed

her job duties to accommodate her. However, at the end of treatment claimant returned to her normal work duties. Claimant felt she had fully recovered.

After 1990, claimant did not return to her chiropractor for treatment. Claimant testified that between 1990 and her work-related accident in April 1993 she never missed work because of her neck and that it did not bother her in any way in doing her work.

Because of other health problems, claimant began seeing Patrick Wolf, M.D., in August 1991. Claimant testified the only problem she experienced with her neck between 1991 and April 1993 was stiffness which occurred approximately one to three (1-3) times per year and lasting two to three (2-3) days on each occasion. Claimant does not recall mentioning her stiff neck to her supervisor. Although she missed work during this period, claimant testified her absences were related to either her children or her other health problems. Claimant testified Dr. Wolf treated her neck but only when she was seeing him for her other health problems.

Claimant's husband testified he was not aware his wife had any significant neck problem between 1991 and 1993. He believes claimant had an occasional stiff neck but no more than other people.

Dr. Wolf testified he first saw claimant on August 6, 1991 and that he obtained a history that claimant had experienced numbness and tingling in her right arm for a year and a half. Dr. Wolf ordered an MRI which indicated a small central bulge at C5-6 but no significant lesions or evidence of herniation. Dr. Wolf diagnosed temporomandibular joint syndrome (TMJ) and cervical radiculopathy. However, the doctor did not feel claimant needed to see an orthopedic surgeon and he did not impose any work restrictions upon her.

Dr. Wolf again saw claimant on August 26, September 5, and September 10, 1991, but she had no neck complaints. In October, 1991 claimant returned with neck complaints and the doctor prescribed heat, rest and a cervical collar, which the claimant testified she only wore at home. At this time the doctor noted in his records that claimant had cervical disc disease and questioned whether she also had an entrapment syndrome. Claimant next saw Dr. Wolf in November, 1991 but had no neck complaints. In December, 1991 claimant was laid off work. The next month she again saw Dr. Wolf and had neck complaints. At that time the doctor diagnosed cervical degenerative joint disease. Claimant next saw the doctor in April, 1992 but did not have symptoms the doctor felt were related to her neck.

Dr. Wolf next saw claimant in May, 1992 with complaints of a sore neck and pain down the right arm. The doctor diagnosed acute cervical muscle spasm. The next visit where neck pain was considered was in December, 1992. Claimant testified that while she was seeing Dr. Wolf she was laid off from respondent from December, 1991 to August, 1992 and again from December, 1992 to February, 1993.

Dr. Wolf believes that claimant, prior to her work-related accident in April, 1993, had a disc bulge and intermittent spasm and degenerative changes in the cervical spine that were chronic and intermittently worse. However, he testified that the majority of claimant's visits focused on complaints other than the neck and that at many visits the neck was not mentioned. Dr. Wolf believes the neck pain claimant experienced in 1992 could have been caused either by headaches or stress. He believes claimant did not have a serious problem with her neck when he saw her in 1991 and that he did not notice the problems

getting worse until the April, 1993 work-related accident. He testified claimant's work was not inhibited until that incident.

Had the respondent possessed the knowledge of the extent of claimant's chronic, intermittent symptoms or that claimant had some type of degenerative, symptomatic condition in her cervical spine, the respondent would have possessed the knowledge that claimant had an impairment that constituted a handicap in her obtaining or retaining employment. However, the respondent did not have that knowledge and only knew that claimant had seen a chiropractor for a brief period in 1990 and occasionally had a stiff neck. The Appeals Board finds respondent's knowledge in this instance is insufficient to place liability upon the Workers Compensation Fund.

Respondent contends claimant missed work because of her neck condition after she had been treated by her chiropractor and that it accommodated her by building her a platform to stand on. The Appeals Board disagrees. The Appeals Board finds claimant did not miss work as a result of her neck problems. This finding is based both upon claimant's testimony and the respondent's records that fail to substantiate that claimant missed any work because of her neck complaints. Also, the Appeals Board finds the respondent did not intentionally accommodate claimant's physical condition by building a platform for her to stand on. To the contrary, the platform was built because of claimant's height rather than any physical problems she may have experienced. This finding is based upon claimant's testimony and that of her co-worker, Frank Coslett, the person who recognized the need for the platform and constructed it.

Based upon the above, the Appeals Board finds the respondent has failed to meet its burden of proof and that the Workers Compensation Fund is absolved of all liability in this proceeding.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the finding of the Administrative Law Judge assessing liability against the Workers Compensation Fund should be, and hereby is, reversed; that the liability for the costs and benefits payable in this proceeding are the responsibility of the respondent and its insurance carrier.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Natalie Haag, Wichita, Kansas
James R. Roth, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director